No. 12,454

IN THE

United States Court of Appeals

For the Ninth Circuit

THE LONDON ASSURANCE (a corporation),

Appellant,

vs.

LOUIS P. LUTFY and BERTHA A. LUTFY (husband and wife),

Appellees.

Appeal from the United States District Court, District of Arizona.

APPELLEES' ANSWERING BRIEF.

JAMES A. STRUCKMEYER,
207 Luhrs Building, Phoenix, Arizona,
Attorney for Appellees.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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PRELIMINARY STATEMENT.

Our argument will be based solely on the record. The facts can not be disputed. Mrs. Lutfy went to Chicago, Illinois from Phoenix, Arizona, to purchase an automobile. On her arrival in Chicago she examined the automobile, was satisfied with its condition, and went to a bank in order to effect payment. She paid the full value of the car, incidentally discharging a lien, and received a certificate of title properly endorsed. She gave the certificate of title to one Marciano in order that Marciano might forward it to the

title department of the State of Illinois. Marciano proved unfaithful to his trust and did not forward the certificate to the title department.

We do not consider the statement "everyone knows" valid authority (Appellant's Opening Brief, page 7) for appellant's attempt to present the appellees as everything from black market operators to fraudulent claimants under an insurance policy.

In the argument it will be necessary to avoid confusion between the word "title" and *actual ownership.* As used throughout the appellant's brief "title" apparently refers to either one of two uses: first, to the title certificate, and, second, as a substitute for "owner" or "ownership".

LEGAL QUESTIONS INVOLVED.

I.

Appellant's question number I (Appellant's Opening Brief, page 5) postulates its answer by presupposing that plaintiffs were not the sole owners of the automobile insured.

The insured—plaintiffs in the lower Court—did not represent that they were the "sole and unconditional owners" of the automobile in question. They did tell the insurer that they were the "sole owners" of the automobile. (T.R., page 26.) There is nothing in the record which shows that the appellees were not the sole owners of the automobile. Appellant argues (T.R., page 5) that appellees did not have *clear title* to the

automobile, that *title* was in a third party and that therefore plaintiffs had no insurable interest in the automobile. It is true that as far as the record shows appellees never had a valid *certificate of title* in their name; that fact alone does not effect ownership.

Referring to the defendant's exhibits it appears that one D. E. Jordan, or Don E. Jordan, owned an automobile. (Defendant's Exhibit No. 2; T.R., pages 76-77.) In September, the appellees purchased and paid for the automobile insured by appellant on September 19th. The car was brought to Arizona. On October 18th a duplicate certificate of title was issued and assigned October 22 to Henry Green. (T.R., pages 77-78.) On October 28th the car was stolen from the appellees (T.R., page 48), and Green sold to Greenspon October 27. (T.R., page 84.)

The exhibits disclose that a certificate of title was given to the appellee and that appellee then returned the certificate of title to one Marciano who was, by mutual agreement, to forward the title to the Illinois title bureau. On the 16th day of October, 1947, while the insured car was in the possession of the appellees in Phoenix, Arizona, D. E. Jordan secured a duplicate title, stating in his application that he had at that time possession of the automobile. (T.R., pages 70-71.) The insured car was on that date in Phoenix, Arizona, in the possession of the appellees.

The exhibits all show—and it was necessarily so decided by the judge of the District Court—that the appellees were in fact the owners of the car insured by appellant, and had been the owners, and are still

the owners, of the car insured, although, as stated by the appellees, they do not have "a certificate of title" for the automobile.

We believe that the record demonstrates that the appellees were, and are, the owners of the automobile insured which was stolen from them. Whether or not appellees had a certificate of title is immaterial to the true ownership. The conclusion reached as to appellant's legal question Number 1 is incorrect.

Even though appellees have no written indicia of title they were in fact the owners of the automobile insured. If it be conceded, *arguendo,* that the appellees were not "sole" owners, the appellant is still liable on the policy. *Barnett v. London Assurance Co.,* 245 Pac. 3, 138 Wash. 673; *Savarese v. Hartford Fire Ins. Co.,* 123 Atl. 763, 99 N.J.L. 435. It may be noted that the car insured here was not a "stolen" car, but was, as far as the record shows, the property of D. E. Jordan who according to the record, gave a certificate of title to Marciano and left the car at Motor Sales Company to be sold.

II.

Appellant asks whether the appellees made representations of material facts which voided the policy.

1 and 2. There is no showing that the car insured and stolen from the appellees was not a new car and that it was not a 1947 model. However, whether it was, or was not, is immaterial. The Supreme Court of the State of Arizona has ruled upon these two points holding that it is necessary for the defendant (insurer) to

allege and prove that false representation was material. *North British & M. Ins. Co. v. San Francisco Secur. Corp.,* 249 Pac. 761, 30 Ariz. 599. It is appellees' contention that there was no concealment or misrepresentation of any material fact or circumstance concerning the policy or the automobile insured, nor does the policy make any of the matter within "declarations" a warranty. (T.R., page 35.)

As to the contention that there was a lien on the automobile insured, appellees insist that the trial Court properly held: (a) that there was no lien on the automobile insured, or (b) that the statement was not material. The record discloses that if there was a lien when the appellees purchased the automobile insured the lien was paid at that time and the record further discloses that the lien, if any, was paid at the latest on October 16, 1947, which was prior to the date of the theft of the automobile from the appellees.

The statement of defendant's counsel concerning this matter is included in defendant's Exhibit No. 1 at pages 65 and 66 of the Transcript of Record wherein counsel stated: "The reason I asked you, Mrs. Lutfy, the information we have is that there was a mortgage on the car to this Exchange National Bank and that a portion of the money that you paid to Jordan was used to pay for that lien. Did you know anything about that at all?"

It is obvious from the exhibits that the original certificate of title issued to D. E. Jordan did not carry the statement that there was a lien. The appellant's evidence, according to its counsel, shows that the

lien was paid at, or before, the time that the appellees became owners of the automobile insured—if there was a lien, and the first actual notation of the discharge of the lien is shown by the record as prior to the theft. Under the exclusion cited by appellees (Appellant's Opening Brief, page 15), there can be no ground for voiding the policy.

III.

Appellees' contention regarding the alleged concealment of material facts as to the representations (1 and 2) that is, that the car was not a new car and that there was a lien on the car, have been discussed. Under this heading the appellees further discuss the method of purchase of the car and the fact that Arizona license plates were placed on the car. The Transcript of Record fails to show that the placing of Arizona license plates on the car was in any way illegal, or unlawful. The general argument is directed to the bona fides of the appellees rather than a legal summation. Appellees will not engage in vituperation and innuendo *dehors* the record: The District Court considered the matter raised by the answer, and properly gave judgment to appellees.

IV.

The appellant asks whether the appellees breached the insurance policy by inability to grant appellant subrogation rights. Again, appellant draws conclusions from matter not before the Court and not in the record. The record does not show that the appellant at any time asked for subrogation rights; the record does show that the appellant flatly refused to pay for the

loss. The record does not disclose appellant made any attempt to recover the car in question or to secure any rights under the policy, and the record shows that the appellant never made any payment under the policy. The rights of subrogation according to the appellant's contract did not attach.

Appellant argues that the car was found but "appellees had no right of recovery because they had no title". (Appellant's Brief, page 21.) This is ridiculous. The appellees were the owners of the automobile and the burden was upon the appellant to proceed with recovery. The appellant states that:

> "Appellees were unable to and did not 'execute and deliver instruments and papers' to appellant. Nor did appellees do anything else toward recovery of the car or assisting appellant in perfecting their rights to recover the car."
>
> Appellant's Opening Brief, page 21.

The record does not show that any documents, instruments, or papers were ever asked of the appellees, The absurdity of the argument is shown by the statement in appellant's opening brief that:

> " * * * appellees have failed to produce and are unable to give appellant any instruments or documents to effect recovery of the car, which they represented to appellant belonged to them as sole and unconditional owners. And thus, appellees have not performed all the conditions of the policy as they allege in Paragraph IV of the Complaint, and are unable to live up to the conditions of Clause 9 of the policy. (T.R., page 35.)"
>
> Appellant's Opening Brief, page 23.

CONCLUSION.

Appellees, in the foregoing, have attempted to confine themselves to a discussion of the record before this Court. We submit that the judgment of the trial Court was correct and must be sustained.

Dated, Phoenix, Arizona,
May 8, 1950.

Respectfully submitted,
JAMES A. STRUCKMEYER,
Attorney for Appellees.